

APR 12 1988
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9 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
10 REGION 9

11 IN THE MATTER OF:)
12)
13 City of San Jose, California,)
14)
15 RESPONDENT) Docket No. 38-15
16)
17 Proceeding Under the Compre-)
18 hensive Environmental Response,)
19 Compensation, and Liability)
20 Act of 1980 (42 U.S.C. §9601,)
21 et seq.))

22 ADMINISTRATIVE CONSENT AGREEMENT

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I. AUTHORITY

(A. This Consent Agreement is entered into pursuant to the authority vested in the President of the United States by Sections 104, 106, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§9604, 9606, and 9622, as amended by the Superfund Amendments and Reauthorization Act of 1986 and delegated to the Administrator of the United States Environmental Protection Agency ("EPA" or "Agency") on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923, and further delegated to the Assistant Administrator for Solid Waste Emergency Response and the Regional Administrators. This authority has been redelegated to the Director, Toxics & Waste Management Division, EPA, Region 9.

B. The City of San Jose ("San Jose") enters into this Agreement pursuant to its authority as a charter city. San Jose consents to and does not contest EPA jurisdiction regarding this Consent Agreement and agrees that it will not contest EPA's authority to enter into or enforce this Agreement, for the limited purpose of enabling San Jose to carry out the polymer spraying and other work specified in Section VI.

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II. STATEMENT OF PURPOSE

In entering into this Agreement, the mutual objectives of EPA and San Jose are:

(A. To have San Jose continue periodic application of a polymer sealant (application was initiated by EPA)

1 in a manner acceptable to EPA to the Alviso Ring Levee until
2 a different interim or permanent remedy is selected by EPA
3 for the naturally occurring chrysotile asbestos in the
4 serpentine rock and soil in the levee is selected by EPA.

5 B. To have San Jose conduct operation and maintenance
6 activities at the San Francisco Bay Environmental Education
7 Center ("Center") designed to control the potential release
8 of naturally occurring chrysotile asbestos from the serpen-
9 tine rocks and soil deposited by San Jose on the grounds of
10 the Center.

11 C. To undertake all actions required by the terms and
12 condition of this Consent Agreement in a cost effective
13 matter in accordance with the provisions of SARA and the
14 National Contingency Plan (NCP), 40 C.F.R. Part 300.61
15 et seq., as amended.

16 III. FINDINGS OF FACT

17 For the limited purpose of entering into this Agreement,
18 San Jose does not contest the following EPA findings of fact:

19 A. San Jose constructed the Alviso Ring Levee ("Levee")
20 in 1983. The Levee was constructed from soil which contains
21 naturally occurring chrysotile asbestos in concentrations
22 measured by EPA in excess of 1%. The Levee, which provides
23 flood control protection for Alviso, is on the perimeter of
24 an area containing rural, industrial and residential land
25 uses.

26 B. The Center is owned and operated by the United
27 States Fish & Wildlife Service. San Jose may have deposited
28 soil, which contains naturally occurring chrysotile asbestos,

1 at the Center as part of the flood control operations
2 outlined above.

3 C. San Jose asserts that it did not know (and EPA has
4 no reason to believe that San Jose knew) that the materials
5 used to build the levee contained asbestos in any form.

6 D. In 1986, EPA began applying the polymer sealant to
7 the Levee to prevent future releases of naturally occurring
8 chrysotile asbestos from the rocks and soil to the environ-
9 ment. EPA also covered the fill soil at the Center as part
10 of the same removal action.

11 E. The Levee and the Center lie within the South Bay
12 Asbestos Area Site ("Site") which is listed on the National
13 Priorities List pursuant to CERCLA §105 (42 U.S.C. §9605).

14 IV. CONCLUSIONS OF LAW

15 For the limited purpose of entering into this Agreement,
16 San Jose does not contest EPA's conclusions of law:

17 A. The Site is a "facility" as defined in §101(9) of
18 CERCLA, 42 U.S.C. §9601(9).

19 B. San Jose is a "person" as defined in §101(21) of
20 CERCLA, 42 U.S.C. §9601(21).

21 C. Any naturally occurring chrysotile asbestos from
22 the serpentine rock used to construct the Ring Levee which
23 has been or may have been released into the environment
24 from the Ring Levee at the Site is a "hazardous substance"
25 as defined in §101(14) of CERCLA, 42 U.S.C. §9601(14).

26 D. The past, present, and potential migration into
27 the environment of the naturally occurring chrysotile
28

1 asbestos from the serpentine rock used to construct the
2 levee constitutes an actual or threatened "release" of a
3 hazardous substance as defined in §101(22) of CERCLA,
4 42 U.S.C. §9601(22).

5 E. With respect to the Ring Levee and the fill
6 material deposited at the Center, San Jose is a potentially
7 responsible party pursuant to §107(a) of CERCLA, 42 U.S.C.
8 §9607(a).

9 F. For the purposes of this Agreement, EPA concludes
10 and San Jose agrees that the naturally occurring chrysotile
11 asbestos from the serpentine rock used to construct the
12 Ring Levee and as fill at the Center does not qualify for
13 the response limitation contained in CERCLA §104(a)(3),
14 42 U.S.C. §9604(a)(3).

15 V. DETERMINATIONS

16 Based on the facts presented in the Background and
17 Conclusions of Law set out above, EPA has determined that:

18 A. The actual and/or threatened release of naturally
19 occurring chrysotile asbestos from the serpentine rock
20 and soil at the site may present an imminent and substan-
21 tial endangerment to the public health, welfare or the
22 environment.

23 B. The actions required by this Agreement are
24 necessary to protect the public health, welfare, or the
25 environment.

26 VI. WORK TO BE PERFORMED

27 All response work performed pursuant to this Agreement
28 shall be under the direction and supervision of a qualified

1 professional engineer selected by San Jose and approved by
2 EPA. Prior to initiation of site work, San Jose shall notify
3 EPA in writing of the name, title, and qualifications of
4 such engineer and of any contractors and/or subcontractors
5 to be used in carrying out the terms of this Agreement.

6 IT IS HEREBY AGREED TO AND ORDERED THAT THE FOLLOWING
7 WORK BE PERFORMED BY SAN JOSE:

8 A. San Jose shall submit a workplan for EPA review and
9 approval which details all technical aspects of the polymer
10 spraying of the Ring Levee for EPA approval. The workplan
11 shall include a schedule for the work and a site safety
12 plan. San Jose shall conduct the work according to the
13 workplan, after EPA approval, and shall continue to apply
14 the polymer to EPA approval until EPA selects a permanent
15 remedy for the Ring Levee, or EPA selects a different
16 interim remedy and San Jose agrees to implement it, or EPA
17 determines that the polymer coating is no longer needed.

18 B. San Jose shall submit a workplan for EPA and U.S.
19 Fish & Wildlife review and approval that provides for
20 elimination of the threat of release of naturally occurring
21 chrysotile asbestos from the serpentine fill material at
22 the Center. The workplan shall provide either for the
23 removal and replacement of the naturally occurring chryso-
24 tile asbestos material or the repair and maintenance of the
25 cover that was previously installed by EPA.

26 C. The work to be performed pursuant to the workplans
27 shall be consistent with all applicable requirements of
28 CERCLA and the National Contingency Plan and shall be

1 conducted in accordance with the standards, specifications,
2 and schedule contained in the approved work plan. Pursuant
3 to CERCLA §121(e)(1), 42 U.S.C. §9621(e)(1), no federal,
4 state, or local permits will be required for work performed
5 pursuant to the workplans which is performed entirely on
6 Site.

7 C. San Jose will submit the workplans and conduct the
8 work on the schedule set out in Exhibit 1 of this agreement.

9 E. Documents, including progress and technical reports
10 as required by the workplans, and other correspondence to
11 be submitted pursuant to this Agreement, shall be sent to
12 the following address(es) or to such other address(es) as
13 EPA or San Jose hereafter may respectively designate in
14 writing, and shall be deemed submitted on the date received
15 by EPA or San Jose. Documents to be submitted to EPA shall
16 be sent to:

17 Nancy Woo
18 Remedial Project Manager (T-4-3)
19 Toxics and Waste Management Division
20 U.S. Environmental Protection Agency
21 Region IX
22 215 Fremont Street
23 San Francisco, California 94105
24 Phone No: (415) 974-7537

25 Documents to be submitted to San Jose shall be sent to:

26 Brian Chan, Project Coordinator
27 Public Works Department
28 City of San Jose
801 North First Street
San Jose, California 95110
Phone No. (408) 277-5161

29 VII. DESIGNATED PROJECT COORDINATORS

30 EPA shall designate a project coordinator who shall
have the authorities, duties, and responsibilities delegated

1 to the remedial project manager by the National Contingency
2 Plan. San Jose shall designate a project coordinator who
3 shall be responsible for overseeing the implementation of
4 this Agreement. The EPA project coordinator will be EPA's
5 designated representative at the site. To the maximum
6 extent possible all oral communications between San Jose and
7 EPA concerning the work to be performed pursuant to this
8 Agreement shall be directed through their respective project
9 coordinators.

10 VIII. RESERVATION OF RIGHTS

11 A. EPA reserves the right to take any enforcement
12 action pursuant to CERCLA and/or any other legal authority,
13 including the right to seek injunctive relief, penalties,
14 and punitive damages for any violation of law or this Agree-
15 ment, although San Jose's voluntary cooperation under this
16 Agreement will be taken into account. EPA expressly reserves
17 all rights and defenses that it may have, including EPA's
18 right both to disapprove of any work performed by San Jose
19 and, if EPA deems it necessary, to request that San Jose
20 perform additional work to prevent release of the naturally
21 occurring chrysotile asbestos from the serpentine rock in
22 the Ring Levee or at the Center to the environment. EPA
23 agrees that it will not disapprove of San Jose's work if
24 EPA has determined that it was performed in a manner consis-
25 tent with the workplans and the schedule.

26 B. San Jose expressly reserves all rights and defenses
27 it may have other than the right to dispute EPA's jurisdic-
28 tion to enter into and enforce this Agreement. San Jose

1 waives any right it might have to seek reimbursement of its
2 costs from EPA pursuant to §106(b)(2) of CERCLA. By entering
3 into this Agreement or by carrying out the work in the work-
4 plans, San Jose does not admit liability for the naturally
5 occurring chrysotile asbestos contained in the serpentine
6 rock which it deposited in the Ring Levee or at the Center
7 or for clean up, removal or other costs for all or part of
8 the South Bay Asbestos Area Superfund Site.

9 C. This Agreement does not release San Jose from any
10 liability that it may have for the Site.

11 IX. INDEMNIFICATION OF THE UNITED STATES GOVERNMENT

12 San Jose agrees to indemnify and hold the United States
13 Government, its agencies, departments, agents, contractors,
14 and employees, harmless from any and all claims or causes
15 of action arising from or on account of acts or omissions
16 of San Jose, its officers, employees, agents, or assigns, in
17 carrying out the work pursuant to this Agreement. EPA is
18 not a party in any contract involving San Jose at the site.

19 X. NOTICE TO THE STATE

20 EPA has notified the State of California pursuant to
21 the requirements of §106(a) of CERCLA.

22 XI. AUTHORITY TO BIND

23 San Jose asserts that the San Jose City Clerk has the
24 authority to execute this agreement and bind the City of
25 San Jose to its provisions. See Exhibit 2 (attached).
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IT IS SO AGREED AND ORDERED:

CITY OF SAN JOSE

By: Andrea Membrano
Andrea Membrano
San Jose City Clerk

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By: Jeff Zelikson
Jeff Zelikson, Director
Toxics & Waste Division
United States Environmental
Protection Agency, Region 9

Date: APR 20 1988

Date: 5-9-88